

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FREDDIE LEE TAYLOR,

No. C-92-1627 EMC

Petitioner,

DEATH PENALTY CASE

v.

RON DAVIS, Acting Warden of the California
State Prison at San Quentin,

ORDER RE GUILT PHASE CLAIMS

Respondent.

I. INTRODUCTION

Petitioner was convicted and sentenced to death for the robbery, attempted rape, and murder of an 84-year-old woman in January 1985. The California Supreme Court affirmed Petitioner's conviction and death sentence in 1990. *People v. Taylor*, 52 Cal. 3d 719 (1990). Petitioner's state petition for writ of habeas corpus was denied in September 1990; his petition for a writ of certiorari was denied by the United States Supreme Court in October 1991.

Petitioner filed his first federal Petition for Writ of Habeas Corpus on July 10, 1995. His First Amended Petition was filed on April 30, 1997, and his second state petition was filed on June 27, 1997 with the California Supreme Court. The second state petition was denied on July 16, 2003. All of the claims were denied on the merits, and certain claims were also denied on state procedural grounds. Petitioner's Second Amended Petition was filed in federal court on March 12, 2004; a portion of that petition was found to be unexhausted. Petitioner's third state habeas, filed on September 12, 2005, was denied on September 11, 2013.

1 Having exhausted all of his claims in state court, Petitioner returned to this Court. Now
 2 before the Court are Petitioner's record-based guilt phase claims, specifically Claims 3(A), 12(C),
 3 12(D) and 15(B). For the following reasons, Claims 12(C), 12(D) and 15(B) are **DENIED**. Claim
 4 3(A) is **GRANTED**.

5 **II. FACTUAL BACKGROUND**¹

6 Carmen Carlos Vasquez, an 84-year-old widow, was found dead by her son on the afternoon
 7 of January 22, 1985. She was severely beaten, and the cause of death was determined to be
 8 traumatic head and neck injuries. Vasquez also had injuries consistent with rape, including a
 9 swollen and bruised genital area, and areas of hemorrhage in her vaginal wall. Additionally, her
 10 underpants were torn. The rape kit did not reveal semen, sperm or foreign pubic hairs.

11 The prosecution's evidence showed that the intruder had entered via a rear door at Vasquez's
 12 home, breaking the glass in the door. Petitioner's palm print was found on a piece of broken glass;
 13 his fingerprints were found on the inside latch of the screen door and on the doorjamb between the
 14 kitchen and the living room. The parties stipulated that Petitioner owned a pair of shoes within the
 15 class of shoes that could have left a shoe print in the house. Petitioner's grandmother lived across
 16 the street from Vasquez, and Petitioner visited his grandmother the evening before Vasquez's body
 17 was found.

18 The defense chose not to present evidence, instead arguing that the prosecution had not met
 19 its burden of proving guilt beyond a reasonable doubt. Defense counsel pointed to unidentified
 20 fingerprints and a footprint that had been found in the house, and argued that someone else could
 21 have been the killer.

22 Petitioner was convicted of first degree murder, robbery, attempted rape, and three counts of
 23 burglary. The jury also found true three prior conviction enhancements, and two special
 24 circumstances (murder while the defendant was engaged in the commission or attempted
 25 commission of a robbery, and murder while the defendant was engaged in the commission or
 26 attempted commission of a burglary). A third special circumstances allegation – that the murder was

27
 28 ¹ The following facts are taken from Petitioner's direct appeal to the California Supreme Court. *People v. Taylor*, 52 Cal. 3d 719, 729-31 (1990).

1 committed while defendant was engaged in the commission or attempted commission of attempted
2 rape – was found not true. The same jury sentenced Petitioner to death.

3 **III. STANDARD OF REVIEW**

4 The habeas statute authorizes this Court to review a state court criminal conviction “on the
5 ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the
6 United States.” 28 U.S.C. § 2254(a).² The purpose of the writ of habeas corpus is to “protect[]
7 individuals from unconstitutional convictions and . . . to guarantee the integrity of the criminal
8 process by assuring that trials are fundamentally fair.” *O’Neal v. McAninch*, 513 U.S. 432, 442
9 (1995); *see also Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993). Because federal habeas review
10 delays finality and burdens state-federal relations, habeas doctrines must balance the protection from
11 unlawful custody the writ offers against the “presumption of finality and legality” that attaches to a
12 state-court conviction after direct review. *See Brecht*, 507 U.S. at 635-38; *McCleskey v. Zant*, 499
13 U.S. 467, 490-91 (1991). Accordingly, a federal habeas court must in most cases presume that state
14 court findings of fact are correct. 28 U.S.C. § 2254(d). In contrast, purely legal questions and
15 mixed questions of law and fact are reviewed *de novo*. *See Swan v. Peterson*, 6 F.3d 1373, 1379
16 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994). In such circumstances, and when the state court
17 has made no factual findings regarding the claim at issue, petitioner bears the burden of proving, by
18 a preponderance of the evidence, the facts necessary to support his claims. *See, e.g., Garlotte v.*
19 *Fordice*, 515 U.S. 39, 46-47 (1995).

20 Even if a petitioner meets the requirements of Section 2254(d), habeas relief is warranted
21 only if the constitutional error at issue had a substantial and injurious effect or influence in
22 determining the jury’s verdict. *Brecht*, 507 U.S. at 638. Under this standard, petitioners “may
23 obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based
24 on trial error unless they can establish that it resulted in ‘actual prejudice.’” *Id.* at 637 (citing *United*
25 *States v. Lane*, 474 U.S. 438, 439 (1986)).

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28 ² This case predates the effective date of the Antiterrorism and Effective Death Penalty Act
of 1996 (“AEDPA”), and thus AEDPA’s standard of review does not apply.

IV. DISCUSSIONA. Claim 3(A)

In Claim 3(A), Petitioner asserts that his right to due process was violated by the trial court's failure to *sua sponte* conduct a hearing on Petitioner's competence to stand trial. According to Petitioner, evidence available prior to and during trial raised doubts as to his competence, and should have triggered the trial judge to order a competency hearing.

A criminal defendant has a constitutional due process right not to be tried or convicted while incompetent to stand trial. This right assures that a defendant has: (1) a rational, as well as factual, understanding of the nature and object of the proceedings against him; (2) the present ability to consult with counsel with a reasonable degree of rational understanding; and (3) the present ability to aid in the preparation of his defense. *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975). Protecting this right is “fundamental to an adversary system of justice.” *Id.* at 172. Due process requires a trial court to conduct a competency hearing if it has a “bona fide doubt” concerning the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *accord Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010).

Only the evidence that was actually before the state court may be considered by a federal habeas court considering a claim that the state court should have held a competency hearing. *Maxwell*, 606 F.3d at 566-68. A good faith doubt about a defendant's competence arises “if there is substantial evidence of incompetence.” *Cacoperdo v. Demosthenes*, 37 F.3d 504, 510 (9th Cir. 1994), citing *United States v. Lewis*, 991 F. 2d 524, 527 (9th Cir. 1993). “[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required’ and ‘one of these factors standing alone may, in some circumstances, be sufficient.’” *Maxwell*, 606 F. 3d at 568 (quoting *Drope*, 420 U.S. at 180).

Petitioner contends that the following should have raised a “bona fide doubt” as to his competence and triggered a hearing: (1) his behavior pre-trial; (2) his behavior during trial; (3) his decisions prior to the penalty phase and; (4) his history of mental illness, including his stays in a

1 mental health hospital, and his diagnoses of brain damage, paranoid schizophrenia, and borderline
2 personality disorder.

3 1. Pre-Trial Behavior

4 To begin with, Petitioner argues that his pre-trial behavior should have created a good faith
5 doubt in the trial judge's mind as to his competence. Specifically, Petitioner points to an exchange
6 he had with the trial judge regarding his attorney during a pre-trial hearing.

7 THE DEFENDANT: We have a problem, though, Judge, you
8 know, with the lawyer and stuff. I don't want him. You know,
9 because nobody can fill my duties and tell me how I feel. See what
10 I'm saying? You know, we get a confrontation about my case. You
11 know, I don't feel like, you know, he tells me today he can feel for me,
12 you know, but he can't feel for me and what I want to say and do.
13 And any other lawyer. . .

14 THE COURT: Any other lawyer?

15 THE DEFENDANT: Any other lawyer can . . .

16 THE COURT: Cannot?

17 THE DEFENDANT: Cannot, you know, feel my feelings or
18 talk for me.

19 THE COURT: But you do want to have counsel represent you?

20 THE DEFENDANT: No, I'm here, you know, if they going to
21 come and talk this same whole stuff.

22 THE COURT: What other way would you suggest?

23 THE DEFENDANT: I don't know.

24 THE COURT: Mr. Veale [Petitioner's trial counsel], are you
25 ready to proceed on Monday?

26 MR. VEALE: I am, Judge, yes.

27 RT at 28.

28 2. Behavior During Trial

During voir dire, the proceedings were halted when Petitioner had a bad headache. RT at
1514. He subsequently appeared in court dressed in his jail attire. When questioned as to why,
Petitioner replied "I didn't want to dress this morning, Judge." RT at 1516.

1 3. Pre-Penalty Phase

2 Prior to the start of the penalty phase, Petitioner made two decisions that he argues created
3 doubt as to his competency. First, he requested that he be excused from appearing at the penalty
4 phase due to headaches that he had been experienced during trial. Petitioner's counsel stated to the
5 trial court:

6 He has indicated to me earlier that, as a matter of fact, before
7 the trial began, that he wasn't sure if was going to be able to sit
8 through it; that he was afraid that he would develop some headaches
9 and things like that, which he has been subject to. And he has noticed
10 that he is feeling that way now and he would ask that the Court allow
11 him to be accented [sic] from this proceeding because it's going to be
12 difficult medically for him to sit here with any comfort because of his
13 various conditions which he suffers from.

14 RT at 2870.

15 In response to questioning from the trial court, Petitioner stated that he could not sit through
16 a discussion of his childhood, and requested excusal from the proceedings even after the trial court
17 stated that Petitioner was putting his counsel in an "awkward situation not to have you available so
18 that he can confer with you as the evidence unfolds." RT at 2871. Ultimately, the trial court
19 required Petitioner to be present at the penalty phase.

20 Second, Petitioner refused to waive the physician-patient privilege and allow his expert
21 witnesses to testify as to his state of mind at the time the crimes were committed.³ The trial court
22 informed Petitioner that he "may be putting Mr. Veale [Petitioner's attorney] in an exceptionally
23 difficult decision here to put forth the best possible argument in your behalf." RT at 2842. Veale
24 himself stated that he did not "believe it should be up to Mr. Taylor, now, with all due respect to
25 him, to make a decision about how this case should proceed now" because he did not "believe that
26 [Petitioner] is in the position to best know how" to convince the jury to impose a sentence of life
27 without parole instead of death. RT at 2844. When asked as to whether he had considered the
28 impact of his decision Petitioner stated:

³ Petitioner's mental health experts were permitted to testify about Petitioner's mental health history and their evaluations of him.

1 Yes, I thought of that, but I was – I don't know – okay. I was
2 speaking to these people, I was speaking – oh well, I was up on the
3 impression that – how can I say this, that they was going to see, you
4 know, if I had any problems. I didn't think they was going to come,
5 you know, in and relate to what I said. I don't know if I am making
6 sense.

7 RT at 2840-41.

8 4. Mental Health History

9 The final evidence Petitioner points to was presented during the penalty phase trial. First,
10 Dr. Carolyn Block testified that Petitioner had been institutionalized at the Tolliver Mental Health
11 Center in December 1984, one month prior to Vasquez's murder. RT at 3401-02. Prior to this point,
12 Petitioner had been convicted of various assaults and jailed, where he attempted suicide. RT at
13 3421-23. At Tolliver, he was diagnosed with paranoid schizophrenia and anti-social behavior with
14 paranoid traits. RT at 3401-02, 3423. Although it was then recommended that Petitioner spend
15 additional time at a state mental hospital, he did not. RT at 3424.

16 Dr. Block also testified that she diagnosed Petitioner with borderline personality disorder.
17 According to her testimony, such a condition – particularly at times of stress – could manifest in
18 transient psychosis, unstable mood conditions and possible insanity. RT at 3379-3444. She also
19 testified that Petitioner had "significant, cognitive problems" and that at times Petitioner "suffer[ed]
20 some loss of cognitive control." RT at 3387, 3395-96.

21 In addition, neuropsychologist Dr. Alexander Nemeth assessed Petitioner and testified
22 during the penalty phase. Dr. Nemeth testified that he "found a distinct discrepancy between
23 functioning on [perceptual] tasks versus functioning on verbal tasks, and the discrepancy was large
24 enough to suspect neurologic causes, that is brain damage, mild, mind you, but clearly diagnosable
25 neurologic impairment." RT at 3498.

26 Dr. Nemeth also testified that, based on his research background and his assessment of
27 Petitioner, he found that Petitioner had personality changes that "typically occur[]" after brain
28 trauma or brain injury, such as "impulsiveness, abrupt breakdown of impulse control, mood swings,
sudden moods of depression or of elated mood, depression, social withdrawal." RT at 3499. In
support of his analysis, Dr. Nemeth pointed in part to Petitioner's exposure "to physical violence

1 from the age of five, through fights, some accidents and a lot of beatings,” including “at [least] one
2 known episode of prolonged unconsciousness.” RT at 3503. Dr. Nemeth specifically noted that
3 Petitioner suffered “exposure to physical violence to the head,” RT at 3504, and noted that Petitioner
4 was also “severely disturbed, emotionally” for reasons other than brain dysfunction. RT at 3499.

5 Dr. Nemeth testified as to a particular interaction that occurred when he was examining
6 Petitioner.

7 Dr. Nemeth: . . . [T]here was a particular episode during the
8 evaluation which was very, very diagnostical for me.

9 It was during the latter part of the second session with Mr.
10 Taylor, where up to that point he was very cooperative and friendly,
11 and pleasant, and I was even surprised at his frustration tolerance was
12 holding up as it was, and then he very abruptly became uncooperative,
13 angry, used profane language, and declared himself unwilling to
14 continue.

15 And this was not really connected in, to my awareness, with
16 any of the content of the interview.

17 It could have been, of course, because he was talking about his
18 family or talking about some of the episodes of fights and police was
19 called, and so it could be – I cannot rule that out, but the abruptness of
20 the mood change, of the impulsiveness, of the sudden irritability to the
21 point of total break in his behavior and lack of cooperation, that, to
22 me, is clearly organic.

23 In other words, that, to me, is one among a number of other
24 signs, or one important sign of – that we are dealing with [a]
25 neurological component, which means some degree of brain damage.

26 RT at 3500-01.

27 5. Analysis

28 As stated *supra*, “a trial judge must conduct a competency hearing whenever the evidence
before him raises a bona fide doubt about the defendant’s competence to stand trial, even if defense
counsel does not ask for one.” *Odle v. Woodford*, 238 F. 3d 1084, 1087 (9th Cir. 2001). This Court
must “review the record to determine whether evidence before the state court raised a “bona fide
doubt” that [Petitioner] was competent to stand trial. *Id.* (citing *Pate*, 383 U.S. at 385). A good faith
doubt about a defendant’s competence arises if “a reasonable judge, situated as was the trial court
judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced
doubt with respect to competency to stand trial.” *Maxwell*, 606 F.3d at 568 (quoting *Kaplany v.*

1 *Enomoto*, 540 F. 2d 975, 983 (9th Cir. 1976)). “[E]vidence of a defendant’s irrational behavior, his
 2 demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in
 3 determining whether further inquiry is required,’ and ‘one of these factors standing alone may, in
 4 some circumstances, be sufficient.’” *Id.* (quoting *Drope*, 420 U.S. at 180).

5 As the record set out *supra* demonstrates, there was ample evidence that should have raised a
 6 bona fide doubt as to Petitioner’s competence. Perhaps the most compelling evidence was
 7 Petitioner’s mental health history. Shortly before the crimes were committed, Petitioner had
 8 attempted suicide and been institutionalized at a mental health center, where he was diagnosed with
 9 paranoid schizophrenia. RT at 3401-23. That evidence alone should have triggered further inquiry
 10 into Petitioner’s competency. The diagnostic criteria for paranoid schizophrenia includes frequent
 11 experience of auditory hallucinations or preoccupation with at least one delusion. Such a diagnosis
 12 clearly raises a bona fide doubt that a defendant has: (1) a rational, as well as factual, understanding
 13 of the nature and object of the proceedings against him; (2) the present ability to consult with
 14 counsel with a reasonable degree of rational understanding; and (3) the present ability to aid in the
 15 preparation of his defense. *See Drope*, 420 U.S. at 171–72. Furthermore, significant other evidence
 16 regarding Petitioner’s mental state, such as his likely brain damage and Dr. Block’s testimony
 17 regarding Petitioner’s diagnosis of borderline personality disorder and its potential to manifest in
 18 transient psychosis, unstable mood conditions and possible insanity, should have raised an issue as
 19 to his competency. *See, e.g., Odle*, 238 F.3d at 1089 (finding that competency hearing should have
 20 been held where clinical evidence raised a doubt as to defendant’s competency and defendant had an
 21 extensive history of mental impairment).⁴

22 The Court emphasizes that it is not suggesting that every person diagnosed with
 23 schizophrenia is incompetent to stand trial. Indeed, this Order does not even address whether
 24 Petitioner was actually incompetent. Rather, the sole issue before the Court is whether the evidence
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 26

27 ⁴ Although some of the evidence emerged after the guilt phase and before the penalty phase,
 28 the evidence which should have triggered a hearing was cumulative. It raised a bona fide doubt as to
 Petitioner’s general competency as to both phases of the trial which were proximate in time.

1 before the trial court should have triggered a *doubt* as to Petitioner's competency, such that a
2 hearing was warranted.

3 While the mental health evidence alone should have triggered a competency hearing, there
4 were also other indicators that should have led the trial court to doubt Petitioner's competency. As
5 the Ninth Circuit has held, competence to stand trial "requires the mental acuity to see, hear and
6 digest the evidence, and the ability to communicate with counsel in helping prepare an effective
7 defense." *Id.* Petitioner's behavior at trial prior to the introduction of the mental health evidence at
8 the penalty phase called into question his ability to communicate with counsel to help prepare an
9 effective defense.

10 For example, Petitioner spoke incoherently to the trial court regarding his attorney during a
11 scheduling hearing, including stating that "I ain't got nothing to say to him. How long will you be
12 around? You know, I won't be around no attorney might as well say." RT at 31. In addition to
13 being incoherent, the statement indicated that Petitioner was not communicating with his attorney,
14 and competence to stand trial requires the ability to communicate with counsel. *See, e.g., Odle*, 238
15 F.3d at 1089. Petitioner later objected to his counsel's request for continuance, even though his
16 counsel stated it was necessary for proper trial preparation, and wore jail clothes to voir dire because
17 he "didn't want to dress." RT at 1516. Finally, Petitioner asked to be excused from the penalty
18 phase due to "headaches" and his various "conditions" and – over the objections of his own attorney
19 – did not allow his expert witness to testify about his state of mind at the time of the crime. RT at
20 2870-71. Given all of the information available, this Court finds that a reasonable jurist "should
21 have experienced doubt with respect to competency to stand trial." *Maxwell*, 606 F. 3d at 568
22 (quoting *Kaplany*, 540 F. 2d at 568).

23 Despite all of the above, Respondent contends that there was not evidence sufficient to raise
24 a bona fide doubt as to Petitioner's competency to stand trial. The Court will address each of
25 Respondent's arguments.

26 To begin with, Respondent maintains that Petitioner's pre-trial ramblings to the trial court
27 represented frustration with his counsel, not an indication of possible incompetency to stand trial. In
28 support of this argument, Respondent cites to *United States v. Mendez-Sanchez*, 563 F.3d 935, 947-

48 (9th Cir. 2009) and *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). Both cases, however, are distinguishable from the case at bar. In *Mendez-Sanchez*, the Ninth Circuit determined that defendant's rambling conversations with the trial court did not trigger the need for a competency hearing. 563 F.3d at 947-48. In that case, however, the trial court questioned defendant extensively about his understanding of the process, and specifically consulted with defendant's attorneys regarding defendant's competency and ability to assist in his defense. *Id.* In addition, there were no other indicators that should have raised a bona fide doubt as to defendant Mendez-Sanchez's competency. Here, by contrast, the trial court did not confer with counsel as to Petitioner's competency and, as detailed *supra*, there was significant other evidence that should have triggered a competency hearing.

Medina is also not relevant here. In *Medina*, a competency hearing was held the day before trial and among other evidence, two psychiatrist reports confirming defendant's competency to stand trial were submitted. 59 F.3d at 1109. Medina maintained on federal habeas that a further competency hearing was warranted, but because the claim was defaulted, it was not addressed on the merits. *Id.* at 1111.

Respondent also contends that Petitioner's wearing of jail attire should not have raised doubts as to his competency. Respondent is correct that a defendant's choice to wear prison attire does not necessarily trigger a competency hearing. *See, e.g. Davis v. Woodford*, 384 F.3d 628, 645 (9th Cir. 2003) (holding that a defendant's refusal to wear civilian clothes or sit in the courtroom did not give rise to a *sua sponte* duty to order a competency hearing). In *Davis*, however, the trial judge questioned defendant at length about his decision, and was satisfied that it was rational. *Id.* at 646. Additionally, defendant Davis did not – unlike Petitioner – exhibit other potential indicia of incompetence, such as time in a residential mental health facility or a diagnosis of paranoid schizophrenia.

Finally, Respondent argues that Petitioner's mental health history was not significant enough to have triggered a competency hearing. First, Respondent points to the report of Dr. Ken Hjortsvang, a board-certified psychiatrist who examined Petitioner about six months prior to trial at his counsel's request. Dr. Hjortsvang's report stated in relevant part:

I did not feel he [Petitioner] was insane at the time of the commission of the crime. I also felt he understood the nature and purpose of the court proceedings and he could stand trial. I felt there could be some mild brain dysfunction. I suggested an EEG and neuropsychological testing which was subsequently done.

Second Amended Petition, Exh. 1, App. 58.

Dr. Hjortsvang's report was *not* presented to the trial court, and thus is not relevant here. This Court must consider the evidence that was actually available and presented to the trial court when determining whether a competency hearing should have been held. *Maxwell*, 606 F. 3d at 566-568. Furthermore, even if Dr. Hjortsvang's report had been submitted to the trial court, and the trial court had concluded based on it that Petitioner was competent to stand trial, there was still enough evidence presented subsequently that should have led to a bona fide doubt as to Petitioner's competency. The Supreme Court has held that if, at anytime during the trial, the trial court becomes aware of circumstances which would lead a reasonable person to have a bona fide doubt as to the defendant's competence, the trial court must suspend the proceedings and conduct a competency determination hearing. *Pate*, 383 U.S. at 385-86. Moreover, even when a defendant is competent at the commencement of his trial, "[the] trial court must always be alert to circumstances suggesting a change" that would render the defendant incompetent to stand trial. *Drope*, 420 U.S. at 181.

Respondent also maintains that Petitioner's history of mental illness did not necessarily raise a bona fide doubt as to his competence. Again, the cases relied upon by Respondent are distinguishable from Petitioner's case. For example, in *United States v. Leggett*, the trial court held a competency hearing after defendant was convicted of assault but before sentencing. 162 F 3d 237, 240-41 (3d Cir. 1998). On appeal, defendant argued that the trial court should have held a *sua sponte* competency hearing prior to the start of trial. The Third Circuit disagreed, finding that, even though a competency hearing had not been held, the trial court had assessed defendant's ability to assist in his defense prior to trial and confirmed defendant's capability on the record. *Id.* at 242. There was no such assessment on the record of Petitioner's competency during his capital trial. Furthermore, there were no medical reports that might have raised a red flag as to defendant Leggett's competency; rather, defendant himself had alleged he had brain damage and schizophrenia during a pre-trial hearing, statements that the Third Circuit concluded were "self-serving" and

1 “undercut by Leggett’s own admission that his impairments did not affect his comprehension of
 2 legal concepts.” *Id.* at 243-44.

3 Respondent also relies on *United States v. Lebron*, 76 F.3d 29 (1st Cir. 1996), where the
 4 defendant argued that the trial court should have held a competency hearing. The First Circuit
 5 disagreed, finding that although there had not been a formal competency hearing, two psychiatrist
 6 reports and defendant’s attorney represented to the trial court that defendant was competent to stand
 7 trial. *Id.* at 30-31. Moreover, the trial court had “carefully and painstakingly sought, commencing
 8 with defendant’s initial appearance before him, to ascertain whether there was any question of
 9 mental competency and to protect [defendant]’s due process rights.” *Id.* at 32. Here, by contrast,
 10 the record is silent as to whether the trial court considered Petitioner’s competency and there were
 11 no expert reports confirming competency submitted to the trial court. The record does not reveal,
 12 nor does Respondent cite to, any on-the-record considerations of Petitioner’s competency by the trial
 13 judge, nor to any questions of counsel by the trial judge as to Petitioner’s competency.

14 In sum, the Court finds and concludes that a reasonable trial judge, given all of the available
 15 evidence regarding Petitioner’s behavior and particularly his mental health history, should have had
 16 a bona fide doubt concerning Petitioner’s competence. *Pate*, 383 U.S. at 385 (1966); *accord*
 17 *Maxwell* 606 F.3d at 568. The Court does not reach this decision lightly, and realizes that neither
 18 the trial court nor Petitioner’s counsel questioned his competency during the lengthy trial. As the
 19 Ninth Circuit has held, however, while the observations of those interacting with Petitioner are
 20 entitled to “substantial weight”, they “cannot overcome the significant doubt about [] competence
 21 raised by the clinical evidence.” *Odle*, 238 F.3d at 1089. The Court also again emphasizes that it is
 22 not finding that Petitioner was in fact incompetent to stand trial. “But [] a reasonable jurist, given
 23 the information available, would have developed doubts on this score.” *Id.* Where, as here, a
 24 petitioner has engaged in incomprehensible ramblings and the record indicates a history of severe
 25 mental illness, including a diagnosis of paranoid schizophrenia, “an inquiry into whether he
 26 possesses the mental acuity to participate in the proceedings is the reasonable and appropriate course
 27 of action.” *Id.* Failure to do so was a denial of due process, and this claim must therefore be
 28 granted.

While the Court grants relief on this claim, it will defer determination of a remedy pending further briefing from the parties. When a habeas petition is granted on the ground that a competency hearing should have been held, “if the record contains sufficient information upon which to base a reasonable psychiatric judgment,” a retroactive competency hearing may be held by the state court, rather than retrying the Petitioner. *Odle*, 238 F.3d at 1089-90. Otherwise, the Petitioner must either be released or retried. *See Maxwell*, 606 F.3d at 577. A briefing schedule for this issue will be set at the end of this Order.

B. Claims 12(C) and 12(D)

In Claims 12(C) and (D), Petitioner maintains that the prosecutor committed misconduct during closing argument. Specifically, Petitioner argues that the prosecutor: (1) shifted the burden of proof; (2) argued to the jury there were only two possible verdicts and; (3) misrepresented the evidence.

The Supreme Court has held that when reviewing a habeas claim of prosecutorial misconduct, the relevant inquiry is not whether “the prosecutor’s remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations omitted). Rather, the issue “is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). “Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.” *Id.* (citations omitted). Relief is not warranted unless a petitioner establishes that any purported instructional or prosecutorial error had a substantial or injurious effect or influence in determining the jury’s verdict. *See Brecht*, 507 U.S. at 638.

1. Burden of Proof

As discussed *supra*, Petitioner maintained at trial that the prosecution had not met its burden of proof. During closing argument, defense counsel suggested that the unidentified fingerprints and footprint indicated that another person might have killed Vasquez. RT at 2701-2708, 2712. In rebuttal, the prosecutor stated: “Coconspirator kills victim in rage. What evidence is there of that? Is it a possibility? I imagine it is a possibility.” RT at 2735. Defense counsel objected on the

grounds that this statement indicated that the burden was on the defense to prove Petitioner's innocence. This objection was overruled by the trial court. RT at 2735-36.

Petitioner cannot demonstrate that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (internal citations and quotations omitted). The prosecutor's statement did not improperly shift the burden of proof onto the defense; rather, the prosecutor was commenting on the state of the evidence. More specifically, the prosecutor was commenting on the weakness of the defense theory of the case that another assailant had been present at the crime. Neither are improper. *See, e.g. United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000); *United States v. Robinson*, 485 U.S. 25, 26-34 (1988); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984) (holding that a prosecutor may comment on the absence of evidence so long as there is sufficient evidence to support the prosecutor's version of events).

In addition, even if the prosecutor had misstated the applicable law, Petitioner does not argue that the jury was mis-instructed on the applicable law. A prosecutor's mischaracterization of the law is less likely to render a trial fundamentally unfair than if the trial court issues the instruction erroneously.

[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court.

Boyde v. California, 494 U.S. 370, 384-85 (1990) (citations omitted); *see also United States v. Rodrigues*, 159 F. 3d 439, 451 (9th Cir. 1998) (confirming that "[t]he jury is regularly presumed to accept the law as stated by the court, not as stated by counsel"). Here, Petitioner does not argue that the jury was not properly instructed regarding burden of proof.⁵ In addition, the jury was instructed

⁵ The jury was instructed regarding burden of proof as follows:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily

1 to follow the trial court's instructions, and that statements made by the attorneys were not evidence.
2 RT at 2754-55. Accordingly, there is no support for Petitioner's claim that the prosecutor's
3 comments rose to the level of reversible misconduct.

4 2. Possible Verdicts

5 Petitioner contends that the prosecutor argued that there were only two verdicts possible: not
6 guilty and felony murder. The prosecutor's comments at issue here are as follows:

7 And when you hear the instructions and when you hear the
8 law, when you consider the evidence notwithstanding the serious
9 nature of this case you will see that it is an all-or-nothing case. There
10 is no question in this case, there will be no instructions, there is no law
11 indicating the consideration of any lesser offense. . . .

12 [I]n this case, based upon the facts presented, it is either
13 murder in the first degree or nothing at all. The defendant is either
14 guilty of felony murder or not guilty.

15 So in many respects, your task, your choice, is a simple one.
16 And I don't mean to belittle the process you must go through, the
17 thought you must give to this case. I am merely indicating that based
18 on the evidence present and the law with which you will be instructed
19 with a choice either the defendant was there or he was not. If he was
20 there he was guilty of the offenses charged.

21 RT at 2654-55.

22 According to Petitioner, this amounts to misconduct because it mis-stated the law, and did
23 not acknowledge the difference between simple felony murder and felony murder with special
24 circumstances. Specifically, Petitioner argues that the prosecutor's comments did not make clear
25 that to find Petitioner guilty of capital murder (in this case, felony murder with special
26

27 _____
28 shown, he is entitled to a verdict of not guilty. This presumption places upon the
State the burden of proving him guilty beyond a reasonable doubt.

...

It is never the duty or burden of a criminal defendant to prove his innocence;
therefore, it is not his burden to establish the existence of any particular reasonable
innocent interpretation of the evidence. The burden is always on the prosecution to
prove every element of a charge beyond a reasonable doubt. You may not employ
speculation, conjecture, or guesswork in order to find to be true any inference urged
by the prosecution.

RT at 2766-67.

circumstances), the jury needed to find more than simply that Petitioner was present at the crime scene.

Petitioner, however, cannot demonstrate that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (internal citations and quotations omitted). Prosecutorial comments must be examined in context. *Williams v. Borg*, 139 F.3d 737, 744 (9th Cir. 1998). Later in his closing, the prosecutor discussed in detail the evidence against Petitioner, the basis for felony murder and first-degree murder, the special circumstances, and the required intent to kill. RT at 2672-2685. When reviewed in its entirety, the prosecutor's closing argument did not misstate the law, nor ignore the issue of special circumstances.

In addition, as discussed *supra*, even if the prosecutor's comments were in error, Petitioner does not argue that the jury was mis-instructed on the applicable law. RT at 2767-73. A prosecutor's mischaracterization of the law is less likely to render a trial fundamentally unfair than if the trial court issues the instruction erroneously. *Boyde*, 494 U.S. at 384-85. Here, Petitioner does not argue that the jury was not properly instructed regarding felony murder and special circumstances. In fact, Petitioner cites to the jury instructions as properly stating the applicable law. *See* Petitioner's Merits Briefing at 18 (citing RT at 2769-70). In light of the full record, the prosecutor's comments did not rise to the level of reversible misconduct. Because the comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," this subclaim must be denied. *Darden*, 477 U.S. at 181 (internal citations and quotations omitted).

3. Representation of Evidence

Petitioner also argues that the prosecutor misstated the evidence at trial by arguing that there was no evidence of additional perpetrators of the crime. According to Petitioner, this was misconduct because there were fingerprints and shoe prints at the scene that did not match Petitioner. In addition, Petitioner notes that a criminologist testified it was "possible" there were two different perpetrators, and that the coroner testified the injuries to the victim were consistent with those inflicted by an insane person. Because Petitioner did not raise an insanity defense, he argues that the coroner's testimony is also evidence of another killer.

1 While a prosecutor may not make statements of fact not supported by evidence, he or she
2 may suggest to the jurors that they make “reasonable inferences” from evidence that is presented
3 during trial. *See, e.g., United States v. Sayetsitty*, 107 F. 3d 1405, 1409 (9th Cir. 1997) (confirming
4 that prosecutors are allowed “wide latitude” in closing argument, including “latitude that embraces
5 reasonable inferences from the evidence presented at trial”) (internal quotations and citations
6 omitted). Moreover, “criticism of defense theories and tactics is a proper subject of closing
7 argument.” *Id.*

8 The prosecutor’s comments at issue here are as follows:

9 The defense has no burden, has no responsibility to present
10 evidence, but they chose to rely upon the reality, the evidence
11 presented in this case, and then would call upon you to speculate or to
engage in guesswork and to create a second person or a possibility of a
second person.

12 Now, if there was a second person, would it make any
13 difference based upon what has been proved in this case, because there
14 may be a possibility and it is for you to determine whether or not it is a
reasonable or plausible possibility, based upon the evidence that you
have been presented with, that a second or third or fourth or how about
100 people were involved in this case.

15 Based upon the evidence that you have been presented with, is
16 that a reasonable conclusion?

17 When you consider that at the point of entry – now, perhaps
18 that would be a more reasonable argument if the defendant’s prints
were not found at the point of entry, were not found on that latch by
the cut, was not found on the Plexiglas, but in some other area of the
home. In the bathroom or in some other place.

20 But the prints of the defendant are found at the point of entry,
21 which is why perhaps [defense counsel] concedes, in essence, in his
rather artistic display of going through that door of a burglary, which
in fact the defendant literally did in that case.

22 Were his print or shoe print impression, latent print, shoe print
23 of a shoe, consistent with a shoe that Mr. Taylor possessed.

24 And you see it really makes no difference because there is no
25 evidence, competent evidence to conclude the first smokescreen that
[defense counsel] throws at you.

26 Well, maybe there was someone else involved, because [the
27 criminologist] could not eliminate eight prints in a home the person
lived in for 40 years, and [the criminologist] could not come up with a
list of every possible person who may have been in that home during
28 that period of time.

1 And [the criminologist] didn't compare these eight prints with
 2 perhaps the husband who had died some years ago, with other who
 3 may have been in the home.

4 It's real convenient, it's real easy in the case like this, Miss
 5 Vasquez can't talk, to throw up that smokescreen.

6 RT at 2722-24.

7 Petitioner cannot demonstrate that these challenged comments "so infected the trial with
 8 unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181
 9 (internal citations and quotations omitted). As discussed *supra*, prosecutorial comments must be
 10 examined in context. *Williams*, 139 F.3d at 744. In addition, reviewing courts are cautioned not to
 11 infer that the jury will draw the most damaging meaning of a challenged comment "from the
 12 plethora of less damaging interpretations." *Id.* (citing *Donnelly*, 416 U.S. at 647).

13 Here, the prosecutor did not misstate the evidence introduced at trial. Rather, after
 14 acknowledging the evidence regarding the additional unidentified fingerprints, he argued that their
 15 presence was to be expected in a home that had been occupied for 40 years, and that the presence of
 16 those fingerprints did not nullify the evidence supporting Petitioner's guilt. These comments are
 17 well within the "wide latitude" that prosecutors are allowed during closing argument, including the
 18 latitude to urge jurors to make "reasonable inferences" from the evidence. *Sayetsitty*, 107 F.3d at
 19 1409. In addition, prosecutors are permitted to – as the prosecutor did here – criticize defense
 20 theories. *Id.* Accordingly, because Petitioner cannot demonstrate that the prosecutor's comments
 21 violated due process or prejudiced the verdict, this subclaim must be denied.

22 C. Claim 15(B)

23 In Claim 15(B), Petitioner argues that his right to due process was violated by an erroneous
 24 aiding and abetting instruction. According to Petitioner, this instructional error likely led to the
 25 jury's finding of guilt.

26 The instruction at issue reads as follows:

27 One who aids and abets is not only guilty of the particular
 28 crime that to his knowledge his confederates are contemplating
 committing, but he is also liable for the natural and reasonable or
 probable consequences of any act that he knowingly aided and
 encouraged.

RT at 2763.

This instruction was taken from the California Jury Instructions (“CALJIC”) applicable at the time of Petitioner’s trial, but it was held to be erroneous in *People v. Hammond*, 181 Cal. App. 3d 463, 465-69 (1986), and subsequently revised. Specifically, the *Hammond* Court found that the instruction was “potentially ambiguous in its failure to inform the jury of its fact-finding function in determining the question of vicarious liability for the unplanned related offense.” *Id.* at 469.

The California Supreme Court addressed this claim in a reasoned opinion on direct appeal.⁶ As to the erroneous instruction, the Court found that:

Any [instructional] error . . . was harmless beyond a reasonable doubt. [citations omitted]. . . . [The jury was required] to find that defendant intended to kill Ms. Vasquez in order to find the special circumstances true. The jury was instructed that in order to find any of the special circumstances to be true it must find that “the defendant intended to kill a human being.” In finding the robbery and burglary special circumstances true, the jury thus determined that defendant intended to kill when he engaged in the commission of burglary and robbery. Since the factual question posed by the omitted instruction was necessarily resolved adversely to defendant by the jury’s finding of intent to kill, there can be no prejudice to defendant.

Taylor, 52 Cal. 3d at 733.

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (“[I]t must be established not merely that the instruction is undesirable, erroneous or even “universally condemned,” but that it violated some [constitutional right].”). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *See Estelle*, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *Prantil v. California*, 843 F.2d

⁶ As discussed *supra*, this is a pre-AEDPA case where the Court is required to apply *de novo* review. *Swan*, 6 F.3d at 1379. Nonetheless, the California Supreme Court’s review of California law is relevant here.

1 314, 317 (9th Cir.1988); *see, e.g., Middleton v. McNeil*, 541 U.S. 433, 434-35 (2004) (per curiam)
2 (no reasonable likelihood that jury was misled by single contrary instruction on imperfect self-
3 defense defining “imminent peril” where three other instructions correctly stated the law). If an
4 error is found, the court also must determine that the error had a substantial and injurious effect or
5 influence in determining the jury’s verdict, *see Brecht*, 507 U.S. at 637, before granting relief in
6 habeas proceedings. *See Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998).

7 Petitioner maintains that the challenged instruction violated his due process rights.
8 According to Petitioner, the jury likely found him to be an aider and abettor, and the instruction led
9 the jury to assume – rather than find – that murder was a natural and probable consequence of the
10 robbery.

11 Here, the Court assumes that the instruction was erroneous. *See Hammond*, 181 Cal. App. 3d
12 at 465-69. Therefore, the Court must determine “whether the ailing instruction by itself so infected
13 the entire trial that the resulting conviction violates due process.” *Estelle*, 502 U.S. at 72.

14 The Court finds that the instructions of the trial court, taken in their entirety, would not have
15 allowed the jury to find Petitioner guilty of the charged crimes without a specific finding that he
16 intended to kill. As the Supreme Court and Ninth Circuit have held, federal courts must accept a
17 state Supreme Court’s identification of the elements of a state criminal offense. *Illinois v. Vitale*,
18 447 U.S. 410, 416 (1980); *Solis v. Garcia*, 219 F.3d 922, 927 (9th Cir. 2000). Here, the jury found
19 true two special circumstances: (1) murder in the commission or attempted commission of a
20 robbery; and (2) murder in the commission or attempted commission of a burglary. *Taylor*. 52 Cal.
21 3d at 729. Consistent with state law, the jury was instructed that in order to find true the special
22 circumstances, it had to find that the “the defendant intended to kill a human being.” *Taylor*, 52 Cal.
23 3d at 733. Therefore, to the extent that the aiding and abetting instruction was ambiguous, any
24 ambiguity was resolved by the jury’s necessary finding that Petitioner intended to kill Vasquez. *See*,
25 *e.g., Solis*, 219 F. 3d at 927-928 (finding that ambiguous aiding and abetting instructions did not
26 amount to reversible error when other instructions given required the jury to find the defendant acted
27 with the requisite intent).

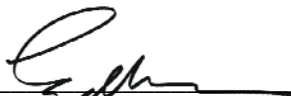
Finally, Petitioner argues that the jury “likely” found him to be an aider and abettor and thus was misled by the erroneous instruction. *See, e.g., Estelle*, 502 U.S. at 72 (stating that reviewing courts must consider “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.”) (internal citations and quotations omitted)). This argument, however, is without merit. Absent the unidentified fingerprints and footprint in the house (which were not surprising given that Vasquez had lived in the home for 40 years), there was no significant evidence of another perpetrator. Based on the evidence presented in the case, this Court cannot find that there was a “reasonable likelihood” that the jury found Petitioner guilty under a theory of aider and abettor liability.⁷ *Id.* Moreover, as discussed *supra*, the fact that the jury found true two special circumstances confirms that the jury found the requisite intent to kill, even with the ambiguous aiding and abetting instruction. In sum, considering the challenged instruction in the context of the trial record and the instructions as a whole, it did not violate Petitioner’s due process rights. *See Estelle*, 502 U.S. at 72; *Brecht*, 507 U.S. at 638. This claim is denied.

V. CONCLUSION

For the foregoing reasons, Claims 12(C), 12(D) and 15(B) are **DENIED**, and Claim 3(A) is **GRANTED**. Within twenty-one (21) days of the date of this Order, the parties should meet and confer, and submit a proposed briefing schedule regarding the issue of available relief for Claim 3(A).

IT IS SO ORDERED.

Dated: February 26, 2016


EDWARD M. CHEN
United States District Judge

⁷ The jury’s deliberation of four days does not indicate, as Petitioner asserts, that the jury believed another person was responsible for killing Vasquez. Petitioner does not demonstrate that four days is an unusually long period of deliberation in a capital case. In addition, the four days of deliberation could well indicate that the jury was carefully considering each of the multiple charges against Petitioner. *See Taylor*, 52 Cal. 3d at 729.